

ORDER OF THE COURT (Fourth Chamber)
31 March 2004 *

In Case C-51/03,

REFERENCE to the Court under Article 234 EC by the Amtsgericht Löbau (Germany) for a preliminary ruling in the criminal proceedings before that court against

Nicoleta Maria Georgescu

on the interpretation of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1)

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of M. J. N. Cunha Rodrigues (Rapporteur), President of the Chamber,
M. J.-P. Puissochet and F. Macken, Judges

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

after hearing the views of the Advocate General,

makes the following

Order

- 1 By order of 21 October 2002, received at the Court on 10 February 2003, the Amtsgericht Löbau (Local Court, Löbau) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1).

- 2 That question arose in criminal proceedings against Ms Georgescu, a Romanian national, for breach of German legislation on the entry and stay of foreigners.

Legal background

Community legislation

- 3 As its title indicates, the purpose of Regulation No 539/2001, which entered into force on 10 April 2001, is to establish the list of third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States (Article 1(1) and Annex I) and the list of those whose nationals are exempt from that requirement for stays of no more than three months in all (Article 1(2) and Annex II).
- 4 Romania is included in the list in Annex II, but an asterisk indicates that the legal position of Romanian nationals has certain particular features and refers to Article 8(2) of the regulation, which reads as follows:

‘However, for nationals of the country in Annex II marked with an asterisk, the date of entry into force of Article 1(2) shall be decided on subsequently by the Council, acting in accordance with Article 67(3) of the Treaty, on the basis of the report referred to in the following subparagraph.

To this end, the Commission shall request the country concerned to indicate which undertakings it is prepared to enter into on illegal immigration and illegal residence, including the repatriation of persons from that country who are illegally resident, and report thereon to the Council. The Commission shall submit to the Council a first report, accompanied by any useful recommendations, no later than 30 June 2001.

Pending adoption by the Council of the act embodying the abovementioned decision, the requirement laid down in Article 1(1) shall be applicable to nationals of that country. Articles 2 to 6 of this Regulation shall apply in full.'

It is apparent from the second recital in the preamble to Council Regulation (EC) No 2414/2001 of 7 December 2001 amending Regulation No 539/2001 (OJ 2001 L 327, p. 1) that, in its report of 29 June 2001, the Commission noted the undeniable progress made by Romania as regards illegal immigration from its country, its visa policy and the controls at its borders, and also set out the commitments entered into by Romania in this field. The Commission concluded its report by recommending to the Council that Romanian nationals should be exempted from the visa requirement as from 1 January 2002.

The third recital in the preamble to Regulation No 2414/2001 states that '[i]n order to apply the visa exemption to Romanian nationals, the provisions of Regulation (EC) No 539/2001 which provisionally maintain the visa requirement should be deleted'.

Regulation No 2414/2001 thus provides inter alia for, first, the deletion in Annex II to Regulation No 539/2001 of the asterisk against Romania and the footnote

referring to Article 8(2) of the latter regulation and, second, the replacement of Article 8 of Regulation No 539/2001 by a new provision under which that regulation is to enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities*.

- 8 Since Regulation No 2414/2001 was published on 12 December 2001, it entered into force on 1 January 2002, in accordance with Article 2, so that from that date Romanian nationals have been exempt from the visa requirement for stays of no more than three months in all.

National legislation

- 9 Under the first sentence of Article 3(1) of the Ausländergesetz (Law on Foreigners, 'the AuslG'), foreigners require a permission to stay in order to enter and stay in German territory.

- 10 Under Article 58(1)(1) of the AuslG:

'Entry into German territory by a foreigner is prohibited if

1. he is not in possession of a required permission to stay'

Article 92(1)(1) and (6) of the AuslG states:

‘A person is to be punished by imprisonment for up to one year or by a fine if he

1. contrary to the first sentence of Article 3(1), stays in German territory without a permission to stay and does not enjoy temporary leave (Duldung) ...

...

6. has entered German territory contrary to Article 58(1)(1) or (2) ...’.

Under Article 2(3) and (4) of the Strafgesetzbuch (German Criminal Code):

‘3. If the law which is in force on completion of the act is amended before the decision, the more lenient law is to be applied.

4. A law which is to be in force for a certain period only is to be applied to acts which have been committed during its validity even if it has ceased to be in force. This does not apply if a law provides otherwise.’

- 13 Article 407 of the Strafprozessordnung (German Criminal Procedure Code) provides:

‘1. In proceedings before the single judge in criminal cases and in proceedings within the jurisdiction of the local criminal court sitting with lay assessors, in the case of a less serious offence, the criminal consequences of the act may, on written application by the Public Prosecutor’s Office, be determined without a hearing by a penal order in writing. The Public Prosecutor’s Office shall make that application if, following the results of the investigations, it considers that a hearing is not necessary. The application must be for specified legal consequences. It starts the public prosecution.

2. Only the following legal consequences of the act may be determined, singly or in combination, by a penal order:

- 1 a fine, caution with reservation of a penalty, prohibition of driving, forfeiture, confiscation, destruction, rendering unusable, publication of the conviction and a fine imposed on a legal person or association,
- 2 withdrawal of a driving licence, where the ban is not longer than two years, and
- 3 dispensation from a penalty.

If the accused is represented by a defence lawyer, imprisonment of up to one year may be imposed, if its enforcement is suspended.

3. Prior hearing of the accused by the court (Article 33(3)) is not required.’

Under Article 408(2) and (3) of the Criminal Procedure Code:

‘2. If the judge does not consider that there is sufficient suspicion against the accused, he shall refuse to make a penal order. That decision is equivalent to a decision refusing to open the main proceedings (Articles 204, 210(2) and 211).

3. The judge must comply with the application by the Public Prosecutor’s Office if there are no objections to making the penal order. He shall order a hearing, if he has objections to deciding without one, or if he wishes to differ from the legal assessment in the application for the penal order or to determine a legal consequence other than that applied for and the Public Prosecutor’s Office maintains its application ...’

Under Article 210(2) of the code:

‘1. An immediate appeal may be brought by the Public Prosecutor’s Office against a decision refusing to open the main proceedings or ordering, contrary to the application by the Public Prosecutor’s Office, a transfer to a lower court.’

16 Article 410 of the code provides:

‘1. The accused may within two weeks from notification, in writing or by making a statement recorded by the court office, lodge an objection to a penal order with the court which has made the order. Articles 297 to 300 and 302(1), first sentence, and 302(2) apply accordingly.

2. The objection may be limited to specific complaints.

3. Where no objection has been lodged against a penal order in due time, it is equivalent to a judgment with binding effect.’

17 Article 411 of the code provides:

‘1. If the objection is lodged late or is otherwise inadmissible, it shall be rejected by decision without a hearing; an immediate appeal may be brought against the decision. Otherwise a hearing date shall be fixed.

2. The accused may be represented at the hearing by a defence lawyer with authority in writing. Article 420 applies.

3. The accusation and the objection may be withdrawn before delivery of the judgment at first instance. Article 303 applies by analogy. If the penal order has been made in accordance with Article 408a, the accusation cannot be withdrawn.

4. When giving judgment the court is not bound by the decision in the penal order, in so far as an objection has been lodged.'

The main proceedings and the question referred for a preliminary ruling

- 18 It is apparent from the order for reference that by application of 1 March 2002, received by the national court on 6 March 2002, the Staatsanwaltschaft Görlitz (Public Prosecutor's Office, Görlitz (Germany)) asked for a penal order (Strafbefehl) to be made against Ms Georgescu.
- 19 The Görlitz Public Prosecutor's Office accuses her of having entered and stayed in German territory on 15 November 2001, contrary to the first sentence of Article 3 (1), Article 55(1), Article 58(1) and Article 92(1)(1) and (6) of the AuslG and Article 52 of the Criminal Code. Since the illegal entry and stay constituted several offences in the same act, the prosecutor's office asked for Ms Georgescu to be sentenced to a fine of 40 daily rates of EUR 9 each.
- 20 According to the national court, it is clear that, at the date of her entry into German territory, Ms Georgescu was subject to the requirement of a visa for entering and staying in Germany, in accordance also with the provisions of

Regulation No 539/2001. It says that whether the conduct at issue is still punishable as an offence depends on the answer to the question referred to the Court for a preliminary ruling.

- 21 Article 2(3) of the Criminal Code lays down the principle of most favourable treatment, under which an offender is not punished or is punished more leniently if the criminal law has in the meantime been repealed or amended in favour of the offender. In the case of framework provisions such as those of Article 92(1)(1) and (6) of the AuslG, the provisions which supplement them are regarded as part of the law. That is the case with the Community legislation exempting nationals of certain third countries from the requirement of permission to stay, so that, at the date of the judgment, the defendant's conduct is in general no longer punishable, in accordance with the principle of retroactivity of the most lenient criminal law.
- 22 The national court adds that Article 2(4) of the Criminal Code, however, makes an exception to that principle in the case of laws which are limited in time. Such a law applies where the legislature, by indicating a time-limit or in some other way, discloses the intent that the legislation it enacts is to apply only for a specified period. In the case of Regulation No 539/2001, the exception might be constituted by the fact that Romania was already included in the list of States whose nationals benefit from the exemption, with application of the exemption merely being postponed.
- 23 The national court observes, however, that in an order of 10 February 2002 the Amtsgericht Görlitz (Local Court, Görlitz) held that Regulation No 539/2001 does not disclose a sufficiently certain intent on the part of the legislature to subject Romanian nationals to the visa requirement for a specified period only.

- 24 In the context of an appeal against that order, the Görlitz Public Prosecutor's Office submitted for its part that Article 8(2) of Regulation No 539/2001 expresses the legislature's intent to subject Romanian nationals to the visa requirement for a defined period only, and that, by including Romania in the list of privileged countries, the Council decided in favour of exempting Romanian nationals forthwith from the visa requirement. That view, it said, is borne out by the preamble to Regulation No 2414/2001, from which it is apparent that the provision exempting Romanian nationals from the visa requirement was already adopted by Regulation No 539/2001 and only its applicability was temporarily delayed for a specific short period of time.
- 25 Finally, in an order of 9 April 2002 the Oberlandesgericht Dresden (Higher Regional Court, Dresden (Germany)) for its part held that it was clear that Regulations No 539/2001 and No 2414/2001 did not intend to alter the legal situation as regards offences committed before the latter regulation was adopted.
- 26 The national court observes that, if the Court were to answer the question referred in the affirmative, the defendant in the main proceedings would still be criminally liable, contrary to what would be the case if the Court answered the question in the negative.
- 27 In those circumstances, the national court decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Must Article 1(2) in conjunction with Article 8(2) of and Annex II to [Regulation No 539/2001] be interpreted as meaning that as from the entry into force of that regulation Romanian nationals now only for a specified time require a visa for

entry and stay in Member States of the European Union for a period not exceeding three months?’

Jurisdiction of the Court

- 28 Under Article 92(1) of the Rules of Procedure, where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action.
- 29 Article 68(1) EC states: ‘Article 234 shall apply to this title [Title IV, “Visas, asylum, immigration and other policies related to free movement of persons”] under the following circumstances and conditions: where a question on the interpretation ... of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon’.
- 30 Regulation No 539/2001, as indeed also Regulation No 2414/2001, was adopted on the basis of Article 62(2)(b)(i) EC, which appears in Part III, Title IV of the EC Treaty. In those circumstances, only a national court against whose decisions there is no judicial remedy in national law may request the Court to rule on a point of the interpretation of those regulations.

- 31 In the present case, it is common ground that the Amtsgericht Löbau is acting in summary criminal proceedings on an application by the Public Prosecutor's Office which may lead either to the making of a penal order, which may be the subject of an objection by the defendant initiating ordinary criminal proceedings at first instance, or to a refusal by the court to make the order applied for by the Public Prosecutor's Office, which may be the subject of an immediate appeal by that office.
- 32 Consequently, it is clear that the Court has no jurisdiction to rule on the question put by the Amtsgericht Löbau, in that the decision in the main proceedings will be one against which there is a judicial remedy under national law.
- 33 In those circumstances, the Court must apply Article 92(1) of the Rules of Procedure and find of its own motion that it lacks jurisdiction.

Costs

- 34 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber)

hereby orders:

The Court of Justice of the European Communities manifestly has no jurisdiction to answer the question referred by the Amtsgericht Löbau (Germany) by order of 21 October 2002.

Luxembourg, 31 March 2004.

R. Grass

Registrar

J.N. Cunha Rodrigues

President of the Fourth Chamber